UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
In re

Case No.
WORLDCOM, INC., et al, 02-13533

Reorganized Debtors.
----------x

January 17, 2006
11:50 a.m.
United States Custom House
One Bowling Green
New York, New York 10004

DIGITALLY RECORDED PROCEEDINGS
(E X C E R P T)

11:45 WORLDCOM, INC., ET AL
WorldCom's Motion for Summary Judgment Against Parus Holdings, Inc.'s, Successor-By-Merger to EffectNet, Inc. and EffectNet, LLC.

Opposition by Parus Holdings, Inc. filed.

Debtors' Motion to Strike Portions of Affidavits Submitted in Support of Claimant Parus Holdings, Inc.'s Response and Opposition to WorldCom's Motion for Summary Judgment.

Opposition by Parus Holdings, Inc. filed.

B E F O R E:

THE HONORABLE ARTHUR J. GONZALEZ
United States Bankruptcy Judge

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(Whereupon, the following is an excerpt from 1/17/06 in re Worldcom, et al, Case No. 02-13533.)

JUDGE GONZALEZ: Please be seated.

The Debtors' Motion for Summary Judgment.

MR. DRISCOLL: Thank you, Your Honor. Robert Driscoll for the Debtors.

JUDGE GONZALEZ: All right. Go ahead.

MR. DRISCOLL: Your Honor, in this proceeding Claimant Parus Holdings asserts two claims. First is for breach of contract against WorldCom's wholly-owned subsidiary Intermedia, and the second is against both WorldCom and Intermedia, asserting various consequential damage claims premised on WorldCom and Intermedia's asserted acting in concert to breach the same contract.

The contract involved in both claims is a November 2000 contract between EffectNet, the predecessor of Claimant Parus Holdings, and Intermedia. It is attached as Exhibit A to our moving papers. Under this

contract, Intermedia agreed to buy voice messaging services from EffectNet for resale by Intermedia to end users. Under section 2.12 of the contract, Intermedia was obligated to have resold EffectNet's services to 10,000 end users by December 18, 2001, and, if Intermedia failed to meet this 10,000 resale quota, it then became liable under section 2.13 of the contract for numeric shortfall times what the contract describes as the "base monthly price." This is called a "Reconciliation Payment" in the contract. There is no dispute that Intermedia defaulted on its resale and Reconciliation Payment obligations for December 2001 through March of 2002.

On the breach of contract claim that is pending, only two issues, I believe, need to be resolved. The first is the number of Reconciliation Payments Intermedia owes; four are acknowledged by the Debtors and 24 are sought by Parus Holdings. The second issue is the amount of the base monthly price that is used to calculate the monthly

Reconciliation Payments. Here the choice is between the basic, and that is a quote, monthly service price of $11.45, which is contended by the Debtors as being appropriate, or the unlimited monthly service price of $27.40 as contended by Parus Holdings. We believe that both issues can be resolved by the Court through application of the contract terms to the undisputed facts.

Starting with the first issue, the number of Reconciliation Payments Intermedia was required to make, this question hinges on whether the contract and the parties' obligations under it were terminated on April 12, 2002, 30 days after EffectNet gave notice of written default to Intermedia. Section 5.2 of the contract entitled "Termination" provides that in the event of a contractual default, the contract can be terminated by giving a written notice of default to the defaulting party. It also specifies that the contract does terminate and will be effective 30 days after such notice, if the defaulting party fails to cure its defaults. As already

stated, it is undisputed that Intermedia was in default to make the Reconciliation Payments for four months, ending March of 2002, and it is also undisputed that under section 5.2 of the contract that general counsel of EffectNet did give written notice of default to Intermedia on March 12, 2002. That is Exhibit D to our motion. As general counsel of EffectNet, Mr. McConnell subsequently explained to WorldCom -- and this is in Exhibit E to the pending motion -- on March 25th, he had given written notice of default to EffectNet pursuant to section 5.2 of the contract, on March 12th, that section 5.2 of the contract provides that the contract will terminate 30 days after such notice, if default is not cured. Then he advised WorldCom -- and this is a quote and it appears on Exhibit E to our motion -- quote, "accordingly, the agreement will be terminated for default by Intermedia on or about April 12, 2002 if the Intermedia defaults are not cured prior thereto." Finally, all parties acknowledge that

Intermedia failed to cure its defaults within that 30-day period. Accordingly, applying the plain terms of section 5.2 of the contract to these admitted facts, the contract terminated on April 12, 2002. A ruling by this Court that the contract was terminated on that date would be consistent with the contemporary explanation by EffectNet's general counsel to WorldCom. Similarly, a ruling by this Court that the contract was terminated on April 12, 2002, would be consistent with EffectNet's contemporaneous acts. After Intermedia failed to respond to EffectNet's notice of default, EffectNet ceased performing on the contract. This is admitted by EffectNet. Such a cessation of performance is specifically authorized under section 5.3 of the contract, when the contract is terminated for any reason.

The consequences, Your Honor, of contract termination are significant. After termination, Intermedia has no ongoing obligation to continue paying EffectNet the

Reconciliation Payments provided for under section 2.13 of the contract. As specified in paragraph 6 of the contract captioned "Survival," none of the party's obligations provided for in section 2 of the contract survive its termination, and this includes the obligation to pay Reconciliation Payments under section 2.12. The result is also consistent with section 5.3 of the contract, which provide for what obligations the parties do remain liable for upon termination of the contract. Those are obligations that accrued before the date of the termination.

Finally, Your Honor, on this point, it is made clear in section 11 of the contract which did survive termination, that neither party to the contract shall be liable to the other for any type of damages or at least for the type of damages that Parus Holdings seeks from Intermedia in this proceeding. In section 11, the parties provided that in no event shall either party be liable to the other for -- now, this is a direct quote -- "for any incidental,

indirect, special, punitive, consequential, or similar damages of any kind, including without limitation, loss of profits, loss of business, or interruption of business.

Parus Holdings seeks to avoid these results and seeks to avoid summary judgment by arguing that limiting Parus Holdings' recovery to the four Reconciliation Payments that are due before or were due before April 12, 2002, somehow deprive it of the benefit of its bargain. We disagree. To the contrary, it seems quite obvious from the contract provisions that we just discussed, the parties in forming this contract bargained to put boundaries around their potential liabilities to each other. This is made, I believe, or evident by the penalty provision of the contract which is section 5.4, where had Intermedia -- not EffectNet -- terminated the contract early, Intermedia would have been liable for a maximum of one half of the 24 months of Reconciliation Payments Parus Holdings now seeks. Parus Holdings also seeks to avoid summary judgment

through the affidavit and statements of the former general counsel of EffectNet, who is now general counsel of Claimant Parus Holdings, Robert McConnell. He, as I stated earlier, was the author of the March 12, 2002 notice of default to Intermedia and the author of the March 25, 2002 letter to WorldCom explaining the consequences of Intermedia's default and failure to cure, and that being termination of the contract on April 12th.

Now, in this Court Mr. McConnell has filed an affidavit four years after the fact, in which he states that he did not intend in 2002 to terminate the contract. We submit, Your Honor, that quite obviously the best evidence of what Mr. McConnell intended to do by his actions in 2002 are the words he then used to describe the effect of the default notice that he sent. Quite clearly, he explained in 2002 that failure to cure by Intermedia on or about April 12, 2002 would work a termination of the contract. Under the best evidence rule and the other

authorities cited in our related motion to strike, we believe Mr. McConnell's after the fact contradictory and self-serving statements should be disregarded by the Court in its evaluation of this summary judgment motion.

Turning now to the amount owed by Intermedia for the Reconciliation Payments that it did not make is already noted. Section 2.13 of the contract, the amount of the Reconciliation Payments is a function of what it has described in the contract as the base monthly price of EffectNet's service times the numeric shortfall of end users resold by Intermedia as measured against the 10,000 per month quota. There is no dispute as to the written numeric shortfalls for the months of December 2001 through March of 2002. They are, as set forth in the table appearing at page 17 of Debtors' initial summary judgment. The only dispute is whether the base monthly price of EffectNet's service was the price of EffectNet's basic service or, as contended by Parus Holdings, a

$27.40 price of unlimited service. Both of these pricing options are described in appendix P of the contract at issue. We believe that based on the plain language in the contract, the $11.40 per month price of basic service is the appropriate contractual reference point for ascertaining the base monthly price. Ignoring the plain language, we believe, of the contract, Parus Holdings contends that the unlimited service price is really the base monthly price.

In addition to being at grammatic odds with the contractual term base, Parus Holdings' contention, I believe, is inappropriately supported by the evidence it offers outside the contract itself, and that consists of its present CEO Mr. Reneau, who in his affidavit frequently states the conclusion that the unlimited price of $27.40 was what the parties intended to be used for the base monthly price. These, however, are ultimate conclusions, and they are not proper statements to support an evidentiary fact finding in summary judgment. Rule 56(e) of

the Federal Rules, I think, makes this perfectly clear. In the words of the rule, ultimately and conclusory facts cannot be utilized on a summary judgment motion. Further, nowhere in Mr. Reneau's affidavit, which is lengthy, does he advise that he actually had firsthand experience or involvement with the negotiation of the contract at issue. He doesn't say he negotiated it. He doesn't say he even participated in the negotiation. Counsel's comments in briefs say he did, but he doesn't say that in his affidavit. Indeed, he didn't even sign the contract. Accordingly, we believe that Mr. Reneau's conclusory statements ought not be regarded concerning what is or what is not the appropriate base monthly price to be applied by this Court.

In summary on the contract breach issue, Your Honor, I believe that application of the contract terms to the acknowledged facts leads to three conclusions. First is that the contract was terminated on April 12, 2002, 30 days after EffectNet gave written

notice of default and Intermedia failed to cure its default. Two, Intermedia has liability to make Reconciliation Payments for the shortfall for the period commencing December 18, 2001, and concluding April 12, 2002. The third conclusion, I believe, is that EffectNet's basic service price of $11.45 should be utilized as the multiplier in determining what the amount of the Reconciliation Payments is that are owed to Intermedia. That is kind of a tortuous path, but sometimes to construe contracts, you have to go through that. I think the deficiencies that we assert in Parus Holdings' consequential damage claims can be dealt with a bit more succinctly, because those deficiencies relate to the principal elements of the claims.

Starting off with Parus Holdings' consequential damage claims against Intermedia, all of those are barred by section 11 of the contract between EffectNet and Intermedia. As I already read into the record, in section 11 the parties agreed to

comprehensively limit their liability to each other. They specifically agreed that in no event would either be liable to the other for, among other things, consequential damages. As noted in our moving papers, such a limitation provision is enforceable under governing Arizona law, and the contract did provide that Arizona law would control with regard to the contract terms. As also provided in the authority cited to the Court, enforceability of such contractual limitations are particularly appropriate in commercial contracts, such as the one between these commercial entities and are before your Court.

In response, Parus Holdings argues that enforcement of section 11 would leave it without an adequate remedy. It also argues that the provision itself is ambiguous, because there is a blank in it. We believe and advocate to the Court that neither argument is available. Even when section 11 is fully enforced, Parus Holdings retains the breach of contract claim and remedy that the

parties bargained for, which is the payment by Intermedia of the Reconciliation Payments that it owed to EffectNet when the contract terminated. As to the blank space creating an ambiguity, Parus Holdings cites no authority supporting that argument and, as noted in our reply in this matter under Arizona law, blank spaces in contracts don't by themselves create an ambiguity or make the provision unenforceable. Indeed, as pointed out in one of those Arizona cases, the blank space or the presence of a blank space simply shows the absence of any agreement on that particular subject. Here, section 11 is fully capable of being enforced as written. The blank, if filled in, would simply have provided for an exception to the scope of the liability limitation. No such exception was inserted. The way it reads is, except for damages arising under section blank, and then it proceeds, in no event shall either party be liable to the other for the various kinds of damages I just mentioned.

Concerning Parus Holdings' civil

conspiracy claim, as noted in our moving papers -- and I don't think there is any disagreement here -- a claim for civil conspiracy cannot rest on proof of the conspiracy alone. It must be accompanied by evidence of acts in furtherance of the conspiracy for a claim to lie. This is true in all the state laws that are potentially applicable to this matter. I don't think Parus Holdings disputes this. But significantly here, all of the acts that Parus Holdings asserted were acts in furtherance of the asserted conspiracy occurring after the merger of WorldCom with Intermedia effective July 2, 2002. This is significant, we believe, because it is the general rule that parent and wholly-owned subsidiary corporations cannot be found to have conspired with each other, because their economic interests are such that they are regarded as one entity.

The Supreme Court's decision in the Copperweld case is the seminal decision in this area. The multiple following decisions

are initially cited, I believe, at page 10 of our opening brief. In response, Parus Holdings offers a handful of cases that had not applied the Copperweld rationale outside its original antitrust context. Those cases are discussed in our reply brief, starting at page 22. But for today's purposes, I think it is sufficient simply to say, there are no controlling cases that are contrary to Copperweld. There are no better reasons and more persuasively analyzed cases than the Supreme Court's considering the inability of a parent and a subsidiary corporation to conspire with each other in an actionable fashion. Accordingly, we believe the conspiracy counterclaim should be summarily rejected.

Parus Holdings' tortious interference claim is, we believe, similarly deficient. It is the general rule that a parent corporation may not be held liable in tort for interfering with a subsidiary's contractual relations with a third party under the same analysis as used by the

Copperweld Court in saying that a conspiracy claim won't lie against them. Their economic interests are so aligned, they are regarded as one entity and, therefore, when a parent company tells a subsidiary to breach a contract, if that were the case, that is not deemed interference, tortious interference, by the general rule.

There are numerous cases on this subject, many of which have been cited to the Court by both parties. One, I think, is perhaps more instructive than most, and that is the Second Circuit's decision in the Boulevard case. In that case, applying Connecticut law, the Court of Appeals reversed a District Court ruling finding that a corporate parent had tortiously interfered with a subsidiary's contractual lease by directing the subsidiary to stop paying rent. In reversing, the Court noted that because of the significant economic unity of interest between a parent and a subsidiary -- and this is a direct quote from the case -- "we do not believe that such a shareholder can be

considered a third party capable of interfering with its own company's contracts."

In the course of its opinion and ruling, the Court of Appeals in Boulevard collected and analyzed numerous cases from other jurisdictions, including two from the State of New York, all applying in varying ways the general rule which precludes tort liability on a corporate parent for interfering with its subsidiary's contractual relations. Here, we request that the Court also apply that same general rule, and dismiss Parus Holdings' tortious interference claim against the Debtors.

Moving now to the deceptive trade practice claim asserted by Parus Holdings, it is a general --

JUDGE GONZALEZ: Before you proceed, the calendar indicates that the parties must have advised Debtors' counsel when preparing the agenda that this would conclude in 45 minutes.

MR. DRISCOLL: That was my

estimate, Your Honor.

JUDGE GONZALEZ: All right. I believe we started about five minutes late.

MR. DRISCOLL: Then I should wrap up, shouldn't I?

JUDGE GONZALEZ: Yes.

MR. DRISCOLL: Then I will. For the reasons stated in our moving papers, Your Honor, I believe also the unfair deceptive trade practice claim and the good faith and fair dealing claim should be dismissed.

Thank you, Your Honor.

JUDGE GONZALEZ: All right. Thank you.

MR. FRIEDMAN: Good afternoon. May it please the Court, Robert Friedman from Kelley Drye & Warren for Parus.

Your Honor, I think it is important before we address the substance of the summary judgment motion to place the Debtors' motion in context. There has not been discovery in this case. They are asking for the extraordinary and unusual relief of summary judgment before discovery, a motion

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which is in this Circuit, quote, unquote, from the Diversified Carting case that we cite, rarely granted. Not only do they seek summary judgment prior to the completion of discovery, not only have they failed to produce entire categories of relevant hard copy documents, not only have they not produced any documents from the electronic searches, but they failed to introduce any evidence in a case in which it is self-evident that there are inherently factual questions on both the contract and tort claims. I think it is important also placing this in context.

If you look at the source of this motion, our proof of claim was filed three years ago. Our claims have not changed since then. The timing has not changed. The substance of the claims have not changed. They did not make a Motion for Summary Judgment at that time. A year and a half ago in the summer of 2004, the claim objections were fully briefed and submitted. At that time, Your Honor, they did not make a summary

judgment motion. They didn't tell the Court that they were purely legal claims here and that our legitimate claims could be dismissed outright. What happened was after the briefing on the claim objections a year and a half ago, we then pursued discovery in this case and, as the Court is aware, there has been a long and tortured history with respect to getting any documents from the Debtors. We had to make a motion to compel over the summer, and that is the first time, Your Honor, in which the summary judgment motion was raised. Their whole defense to our motion to compel, Your Honor, was: "Oh, now we are making a summary judgment motion, and there is an easy way out. We don't have to get into the Zubulake issues. We don't have to get into cost shifting. We don't have to get into a complex analysis of what was produced and not produced. Just dismiss the case or grant us the summary judgment motion on the nominal amount which they agree they owe us on an admitted breach of contract." Your Honor, the easy way out is not the

proper way out and it is not the legal way out in this case.

The Court is certainly aware of the standard for summary judgment. We are entitled to every single inference. When a summary judgment motion is made prior to completion of discovery, that deference is magnified exponentially. I mentioned the Diversified Carting case. We also cite the Sanders case in which the Court said, if there is even an expectation of material evidence, that is enough to defeat a summary judgment motion under Rule 56(f). We have made a detailed specific showing, both from an affidavit that I submitted and that Mr. Reneau submitted, that there is a great deal of material and relevant evidence that has not been produced with respect to both our contract and tort claims. These include documents relating to the termination of our product, the UC Contract communications between WorldCom and Intermedia during the relevant time period, which is prior to the date of the merger, and documents relating to

competitive products. It is our view supported by evidence, which we have detailed in these affidavits, and supported by documentary evidence submitted, even prior to discovery, Your Honor, that shows that WorldCom prior to the merger had a competitive product, and they had no intention of going forward with our product. It is conceded. It is not even disputed by the Debtors. They intentionally took the legs out of our product. Either they didn't tell us while it was going on or Intermedia didn't know about it, but whatever the case, WorldCom is responsible for that. They had a competitive product, and they tortiously interfered, conspired, and unfairly took the legs out of our contract. What the Debtors do, Your Honor, is they essentially say -- and this is a quote from their brief -- all of this evidence is, quote, unquote, properly ignored. Well, under the law of this circuit you can't properly ignore the evidence, especially when we haven't had an opportunity to complete discovery. Right now, for the

first time, they have informed us, Your Honor, that they are doing a search for the electronically stored documents. That is underway right now. In addition, we have now received information with respect to a privilege log in which they have withheld documents that involve communications between WorldCom and Intermedia prior to the merger. There is absolutely no basis for them to withhold these documents. We are waiting for these electronic documents to be produced. We are waiting for the documents from the privilege log and we are waiting for the hard copy documents. We don't have those yet.

Rule 56(f), Judge, is a strong basis for this Court not even to entertain this motion at this time. We are still litigating the discovery. However, I want to address the substantive claims in any event, and I will start with the contract claim. There are two sources of direct damages, two types of direct damages that we are claiming through the contract. One is the minimums, called the Reconciliation Payments, which

Mr. Driscoll referred to, and the other are the benefit of the bargain damages. Make no mistake about it. I believe, not intentionally so, but there was some overlap in Mr. Driscoll's presentation with respect to the limitation of liability clause. We address in our papers why that provision should not be enforced, but I am not going to address that here because I recognize there is a concern on timing and we address it sufficiently in our papers. The damages I am going to talk about now are direct damages, not consequential, the direct damages that we are entitled to under the contract.

When Mr. Driscoll says that we have a remedy under the contract, what he doesn't say is the key provisions under the contract sections 2.12 and 2.13, they don't say that the reconciliation obligation stops at termination. What they say and in reliance of this we ramped up, which is specified in the Taj Reneau affidavit, and we relied on this provision in the contract, until December of 2003, which is the 24 months that

Mr. Driscoll referred to, they had a minimum payment due to us. That is a clear contractual obligation. What they are saying now is because they didn't pay us and because they stopped performance and because they breached the contract, their obligation to make that payment stops upon termination, and that is just not the case. I am going to even assume for this argument, Your Honor, that they are right about Mr. McConnell's submission with respect to the termination of the contract, which we strongly dispute, and I will address it in a moment. But even assuming they are right, our claims had accrued by their own admission in July of 2001. The timing is critical. There was no termination until April of 2002. At that time, under the definition of "accrual," which we set forth in our papers and the principle anticipatory repudiation, they become liable for all the minimums under the contract. That is the way anticipatory repudiation works. They are obligated to give us minimums up through December of 2003.

They tell us we are not performing, which they did as of July of 2001. They essentially shut down the contract. At that point their contractual obligations can be enforced at any time. Those claims have accrued. We have cited several cases from the Arizona Supreme Court, Gust, Rosenfeld, which says claims accrue at the time you can sue. When they told us that they weren't going to perform, we could sue at that time. The claims accrued. We also cite the Enyart case, the Arizona Appeals Court decision, in which despite the fact that there was no obligation to pay at that point, as we had in this case, the claims had accrued and their obligations under the minimum, provisions 2.12 and 2.13, had accrued. They don't address our accrual argument in their papers and Mr. Driscoll didn't address it here. They don't address our anticipatory repudiation argument either. Under anticipatory repudiation, as the Court is aware, once a party indicates that it is not going to perform, we are entitled to cease

performance and enforce our claims under the contract, even claims for which a payment obligation had not been made yet, or under the contract terms, a time had not come up. What they say -- and by the way, we cite the United California Bank case, another case directly on point that says, if one party indicates it will not perform, the breach is committed at that time and the remedy accrues, not for just their outstanding invoices, but for what they obligated themselves to under the contract, which is the minimum payments. That is why we devoted one-third of our entire company to this product, which we set forth in the Reneau affidavit. Their only response to this, Your Honor, without citing any authority in their reply, when we raise the anticipatory repudiation and the accrual argument is, well, you didn't elect your remedy properly. They say, when we told you we weren't going to perform, what you should have done is you should have elected your remedy and sued us. Well, the reason they cite no authority on

that, Your Honor, is it is directly contrary to Arizona law. There is an Arizona case directly on point, in which this argument was made by the breaching party, and the Supreme Court of Arizona rejected it. That is the case of Kammert Brothers v. Tanque Verde. Now, that case is not in our papers, and I want to put the citation on the record, because this election argument was first raised by Debtors in their reply papers, and we, obviously, don't get a sur reply. The cite of this case is 102 Ariz. 301, parallel citation 428 P.2d 678. If the Court could indulge me to read the relevant quotation in this case. It alone is a basis to reject their entire argument with respect to the minimums. The Supreme Court said, quote, the seller claims that there can be no anticipatory repudiation here, since the buyer failed to immediately treat the repudiation as a breach and bring suit. We believe that it is not necessary to say that a breach is not an anticipatory breach until it has been accepted as such by the injured

party. A party that has received a definite repudiation by the other party to the contract should not be penalized for his efforts to make the other party live up to his end of the bargain and can cease urging performance and bringing suit for the breach at any time before the other party retracts his repudiation. That is the law of California. Under that law, Your Honor, the minimums for the 24 months became accrued --

JUDGE GONZALEZ: That is a law of California or Arizona?

MR. FRIEDMAN: I am sorry, Your Honor. I was thinking of the United California Bank case. It is in Arizona. I apologize. Now, this is directly on point, because that is exactly what happened here. Mr. McConnell in his letters was seeking to do exactly that, exactly what the Arizona Supreme Court said you can do, which is try to resolve the issue. They refused to pay us. We sent a letter that says "pay us," and we cited the provisions of the contract, which Mr. Driscoll pointed out. But the

McConnell letter also contains conditional language, even beyond the anticipatory repudiation point. Mr. McConnell explains in his affidavit that his goal in sending this letter was to get payment of the amounts due, as the Court in Kammert said was permitted under Arizona law. He says at various points in both letters, which is not cited by the Debtors, if there is a termination, we may seek termination. Clearly, Your Honor, those letters, which Mr. McConnell explains, are not a basis to extricate Debtors from their clear obligations under the contract.

In addition, Your Honor, Mr. McConnell in his affidavit offers uncontradicted evidence that the parties after he sent the letter did not treat the contract as terminated. He specifically cites some discussions with Jeffrey Shu, a WorldCom attorney. This is unrebutted. In fact, the only response to this submission, Your Honor, is a motion to strike this evidence.

I just want to address very

briefly, Your Honor, the pricing issue which Mr. Driscoll discussed. Make no mistake about it. The term "base monthly price" is an undefined term. It is not defined anywhere in the contract. This is tailor-made for the introduction of evidence to explain what the term means. "Base monthly price" is not defined. Under the decisions that we point out in response to their motion to strike the Reneau affidavit, Arizona law is very liberal with respect to the introduction of evidence and the consideration of evidence. If it doesn't contradict the contract, it comes in and should be considered. Here, Mr. Reneau explains that the only price that was negotiated was the unlimited price. "Base monthly price" is a term of art. Basic service and "base monthly price" are not equivalent. Those are explained in the affidavit. Should the parties have defined the term "base monthly price"? Yes, they should have. All of the accounts, I think with the exception of one, were unlimited

service.

As Mr. Reneau explains in his affidavit, the basic service was simply a fallback to do some sampling. If someone wanted to sample the service, they could use the basic service just to see what it is like. Like if a salesmen goes out and says, "Hey, do you want to try it for a week and use the basic service?" Importantly also, as explained in the Reneau affidavit, the basic service came with additional costs. The unlimited service, which was the base, as Mr. Reneau explains, and which is a term of art in the industry, was a fixed rate. It was a fixed basic rate.

Your Honor, finally on the contract, the Debtors misunderstand apparently what our "benefit of bargain" argument is. We are not seeking consequential damages. Under Arizona law, benefit of the bargain damages are direct damages. We are seeking loss of value, which the restatement, which Arizona follows, directly distinguishes between consequential

damages and benefit of the bargain damages. This is an entirely separate category of our claim. We are seeking the benefit of our bargain, the loss of value of this contract to us, and all the back-up evidence is submitted, again, in the Reneau affidavit. With respect to what we did, it is undisputed by the Debtors.

Mr. Driscoll mentioned when he concluded with respect to the contract claims, that the argument that the Debtors have made takes a tortuous path and, indeed, I agree with him. In order for them to go through all of the undefined terms without any evidence, in order for them to say that they should be extricated from clear contractual obligations to pay the 24 months or the minimum, I believe I agree with them -- it is tortuous and it should be denied.

With respect to the tort claims, Your Honor, we have several different tort claims. I recognize that we are running out of time, so I will try to be brief. The most

important issue with respect to their tort claims in which the Court does not even have to get into all of the issues with respect to Copperweld, and the exceptions to the privilege involve very simply this: prior to January 1, 2001, these were not unified entities. It is undisputed the bulk of our tort claim, not all, but the bulk of our tort claims, and our allegations relate to the period from September 2000 to July 2001. They simply have no basis to assert privilege in this case, Your Honor, and they have no response to this in their papers. Look through their papers. You will see that their only response is to say, "Well, yes, you do allege that the allegations occurred during that time period. But you know what? That is just boilerplate, so we should just ignore that." Even though, obviously, that is essentially a 12(b)(6) motion that is being decided on the pleadings, because we haven't had the benefit of discovery. We have alleged and we have shown very clearly and specifically, as best we can with the

limited discovery, that between September 2000 and July 2001 there was significant evidence that WorldCom never intended to go forward with this contract. Because of their competitive product, they took the legs right out of our own product. What they do, Judge, is they say, "Well, you know what? We have this Antitrust Order, and it is curious that you didn't hear Mr. Driscoll mention the Antitrust Order, because this was this whole defense to our opposition." This was their whole response to our opposition, when we argued that it is a factual issue with respect to an exception, the exception of wrongful means. We showed that WorldCom used wrongful means with respect to their conduct on this contract. What they said was, "Hey, listen, we have this Antitrust Order that obligates us to divest of Intermedia." Mr. Driscoll didn't mention this for several reasons during his argument. Number one, the Antitrust Order is extremely important, because the language of the Antitrust Order says that they are not to do anything to

abrogate or hinder the contractual relationships between Intermedia and its contracting parties. They must divest of these entities as a going concern. They violated that. Not only did they violate our rights, Your Honor, but they violated the Antitrust Order. In addition, if you accept that the Antitrust Order has any place as a defense to our showing that they used wrongful means, under the Antitrust Order there is no unity of interest. They don't have a privilege to begin with, because if you look at the terms of the Antitrust Order, it specifically says that WorldCom and Intermedia are to be deemed separate entities, competitive. This was a condition put upon them by the Department of Justice. They had no basis to assert a privilege under the Antitrust Order.

Your Honor, I think it is self-evident and I don't need to spend a lot of time on the exception to the privilege that they assert with respect to our tortious interference and the conspiracy claim. We

can show that it was not in the subsidiary's interest. We can show wrongful means. The cases hold conclusively that these are fact-based considerations. We have received no discovery. We have made a showing on the limited discovery we have that is set forth in our papers with respect to both the direct and circumstantial evidence of both the improper conduct, the wrongful means, and the fact that this was not in Intermedia's interest.

Your Honor, at best this motion is premature, and at worse it is frivolous. Either way, it should be denied.

JUDGE GONZALEZ: All right. Thank you.

Mr. Driscoll, do you care to respond?

MR. DRISCOLL: Very briefly. I agree with counsel that the Court can look at the pending motion as a motion brought under 12(b)(6) of the Federal Rules, the motion to dismiss, and that it does not require evidence outside for the matters that are

before the Court at this point. Certainly the contract speaks for itself and so on. I do not think any further evidence is required, so I agree.

Thank you, Your Honor.

JUDGE GONZALEZ: All right. Thank you. I will take it under advisement.

C E R T I F I C A T E

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

I, DEBORAH HUNTSMAN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That the within is a true and accurate transcript of the proceedings taken on the 17th day of January, 2006.

I further certify that I am not related by blood or marriage to any of the parties and that I am not interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of January, 2006.

_____
DEBORAH HUNTSMAN

**DIGITALLY RECORDED CD RECEIVED BY COURT REPORTER ON 1/18/06 AT 12:45 P.M.

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